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No._____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

DENVER EARL ANDERSON,

Petitioner,

v.

UNITED TELEPHONE COMPANY OF KANSAS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a defendant, under the Federal Rules of Civil Procedure, waive the right to assert the defense of failure to plead and prove a prior criminal conviction under a statute providing for both criminal penalties and civil liability, if, in fact, a prior criminal conviction is a prerequisite for civil liability, where that defense is raised, if at all, only by the trial court, *sua sponte*, after a verdict has been returned and defendant filed its post-trial motions on other grounds?

2. May a trial court, under the Federal Rules of Civil Procedure, grant judgment n.o.v. based upon a defense that was raised, if at all, only by that trial court, *sua sponte*, after a verdict had been returned and defendant had filed its post-trial motions on other grounds, and where the defense rests upon the interpretation of a state statute, of first impression, without certifying the interpretation issue to that state's highest court?

3. Does a statute providing for both criminal penalties and civil liability, by requiring a prior criminal conviction as a prerequisite for civil liability, violate the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution?

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DENVER EARL ANDERSON,

Petitioner,

v.

UNITED TELEPHONE COMPANY OF KANSAS, INC.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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PETITION FOR WRIT OF CERTIORARI

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[1] All parties to the proceeding in the United States Court of Appeals for the Tenth Circuit, whose judgment is sought to be reviewed, appear in the caption of this case. Plaintiff's Complaint in the District Court also named, as defendants, United Telecommunications, Inc., 2330 Shawnee Mission Parkway, Westwood, Kansas 66205 and United Telephone System, Inc., 5454 West 110th Street, Overland Park, Kansas 66207. These two defendants were subsequently dismissed from the case, leaving only United Telephone Company of Kansas. 28 U.S.C. §2403(b) may be applicable in this case and this Petition is being served upon the Attorney General of the State of Kansas, to whom this fact has not been certified.

STATEMENT OF THE CASE

I. Nature Of The Case And Course Of The Proceedings

Petitioner's Complaint is in five (5) Counts, alleging age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.*, retaliation in violation of the Age Discrimination in Employment Act, breach of an implied employment contract under Kansas common law, fraud under Kansas common law and blacklisting under Kan.Stat. Ann. §§44-117, *et seq.*

The jurisdiction of the trial court, the United States District Court for the District of Kansas, was invoked pursuant to 28 U.S.C. §§1331 and 1332, Rule 18(a) of the Federal Rules of Civil Procedure and §7 of the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.*

The District Court granted respondent's Motion for Judgment at the close of petitioner's evidence on petitioner's claim of fraud only. The remaining Counts were submitted to the jury. The jury found in favor of respondent on petitioner's age discrimination, retaliation and breach of contract claims. The jury found in favor of petitioner on two separate instances of blacklisting and assessed damages in

the amount of $128,000.00 for each instance. (App. 73-78.)[2] The total jury verdict on the blacklisting Count was $256,000.00. This verdict was subject to a treble damage award by the District Court and petitioner's attorney's fees were to be added as costs, pursuant to Kan.Stat.Ann. §44-119.

Respondent thereafter filed a Motion for Judgment Notwithstanding the Verdict and Alternative Motion for New Trial on petitioner's blacklisting claims, and petitioner filed a Motion for New Trial on his breach of contract claim. By Order of May 22, 1989 (App. 61-70)[3] , the District Court granted respondent's Motion for Judgment Notwithstanding the Verdict and denied petitioner's Motion for New Trial on the contract claim. The Judgment in a Civil Case was entered on the same day. (App. 79-80.) A Notice of Appeal was filed by petitioner on May 25, 1989. By Order of May 31, 1989 (App. 81-82), the District Court denied

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[2] References to the Appendix to this Petition for Writ of Certiorari, contained herein, will be cited as "App. __".

[3] *Anderson v. United Telephone Company of Kansas*, No. 86-2511 (D. Kan. May 22, 1989)

respondent's Alternative Motion for a New Trial, finding that there was sufficient evidence to support the jury's verdict on petitioner's blacklisting claim. Again, a Judgment in a Civil Case was filed on that same date. (App. 83-84.) A second Notice of Appeal was filed by petitioner on June 15, 1989. Respondent did not file a cross-appeal. Subsequently, the case was argued before the United States Court of Appeals for the Tenth Circuit.

On May 6, 1991, a panel of the Tenth Circuit filed its Opinion, per Judge Tacha, who was joined by Judge Brorby. Judge Seymour dissented in a separate Opinion. (App. 37-60.)[4] The majority decision states that the Kansas blacklisting statute requires a criminal conviction as a prerequisite to civil liability and that respondent did not waive the right to assert the defense of failure to plead and prove a prior criminal conviction on petitioner's blacklisting claim, even though that defense was raised, if at all, only by the trial court, *sua sponte*, after a verdict had been returned and defendant had filed its post-trial motions on other grounds. The

[4] *Anderson v. United Telephone Company of Kansas*, No. 89-3152 (10th Cir. May 6, 1991).

jurisdiction of the United States Court of Appeals for the Tenth Circuit was invoked pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure and 28 U.S.C. §1291.

On or about May 20, 1991, Petitioner filed his Petition for Rehearing and Suggestions for Rehearing En Banc with the Tenth Circuit. That Petition was denied by Order dated June 6, 1991. (App. 71-72.) This Order indicates that, in the poll taken, Judges McKay, Logan and Seymour voted in favor of granting rehearing *en banc*.

II. Jurisdiction

The Opinion of the United States Court of Appeals for the Tenth Circuit, dated May 6, 1991 (App. 37-60), which sanctioned the May 22, 1991 Memorandum and Order of the District Court (App. 61-70), is the Opinion regarding which petitioner now seeks review.

Petitioner's Petition for Rehearing was denied by Order dated June 6, 1991. (App. 71-72.)

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

III. Constitutional Provisions, Rules And Statutes Involved In The Case

Two Constitutional provisions are involved in this case. The first, the Fifth Amendment to the Constitution of the United States, provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V. The second, §1 of the Fourteenth Amendment to the Constitution of the United States, provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1.

The Rules involved in this case are Rules 9(c), 12(h)(2) and 50(a) and (b) of the Federal Rules of Civil Procedure. Rule 9(c) states:

> **Conditions Precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

Fed.R.Civ.P. 9(c). Rule 12(h)(2) provides:

> A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

Fed.R.Civ.P. 12(h)(2). Rules 50(a) and (b) read as follows:

> **(a) Motion for Directed Verdict: When Made; Effect.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order

of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was

> returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Fed.R.Civ.P. 50(a), (b).

As concerns statutes, the Kansas blacklisting statute, §§44-117, 44-118 and 44-119, as well as §60-3201 of the Kansas Uniform Certification of Questions of Law Act, Kan. Stat. Ann §§60-3201, *et seq.*, are involved in this case. The Kansas blacklisting statute provides as follows:

> *44-117. Employer not to prevent discharged employee from obtaining employment.* Any employer of labor in this state, after having discharged any person from his service, shall not prevent or attempt to prevent by word, sign or writing of any kind whatsoever any such discharged employee from obtaining employment

from any other person, company or corporation, except by furnishing in writing, on request, the cause of such discharge.

History: L. 1897, ch. 144, Section 1; May 8; R.S. 1923, 44-117.

44-118. Same; penalty. Any employer of labor, his agent or employee, who shall violate the provisions of this act shall be guilty of a misdemeanor, and shall upon conviction be fined for each offense the sum of one hundred dollars and thirty days' imprisonment in the county jail.

History: L. 1897, ch. 144, Section 3; May 8; R.S. 1923, 44-118.

44-119. Same; liability; attorney's fee. Any person, firm or corporation found guilty of the violation of this act, shall be liable to the party injured to an amount equal to three times the sum he may be injured, and such employers of labor shall also be liable for a reasonable attorney fee, which shall be taxed as part of the costs in the case.

History: L. 1897, ch. 144, Section 4; May 8; R.S. 1923, 44-119.

Kan.Stat.Ann. §§44-117, 44-118 and 44-119. The Kansas Uniform Certification of Questions of Law Act, provides, in relevant part, as follows:

> The Kansas supreme court may answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States, a United States district court or the highest appellate court or the intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court and the court of appeals of this state.

Kan. Stat. Ann §60-3201 (1979).

IV. Facts

The issues on appeal are: (1) whether respondent waived the right to assert the defense of failure to plead and prove a prior criminal conviction, if, in fact, the Kansas blacklisting statute was properly construed to contain such a prerequisite for civil liability, when that defense was raised, if at all, only by the trial court, *sua sponte*, after a verdict had been returned and defendant had filed its post-trial motions on other grounds; (2) whether the trial court properly granted judgment n.o.v. based upon a defense that was raised, if at all, only by that trial court, *sua sponte*, after a verdict had been returned and defendant had filed its post-trial motions on other grounds, and, as that defense rests upon an interpretation of the Kansas blacklisting statute, which interpretation presents an issue of first impression in the Kansas state courts, without certifying or allowing for certification of the issue of interpretation to the Supreme Court of Kansas; and (3) whether the Kansas blacklisting statute, which provides for both criminal penalties and civil liability, requires a prior criminal conviction as a prerequisite for civil liability, and, if so, whether such prerequisite violates the Equal Protection Clause of the Fourteenth Amendment and the Due

Process Clause of the Fifth Amendment to the United States Constitution and, whether such statute must be given the interpretation that is constitutional, where it is subject to two different interpretations in this regard, one constitutional and one unconstitutional. These issues involve questions of law. At trial, the jury returned a verdict in favor of petitioner on Count V of his Complaint (blacklisting) and awarded him $256,000.00 in damages. (App. 77-78.) The trial court denied respondent's Motion for New Trial and found that there was sufficient evidence to support the jury's verdict on the blacklisting claim, concluding that respondent's Motion for New Trial should be denied if the granting of respondent's Motion for Judgment Notwithstanding the Verdict is hereafter vacated or reversed. (App. 81-82.) The facts of this case are not in issue on appeal and the case may be properly decided on the questions of law presented.

ARGUMENT

I. Respondent Waived The Right To Assert The Defense Of Failure to Plead And Prove A Prior Criminal Conviction And The Trial Court Improperly Granted Judgment N.O.V. Based Upon That Defense, Which Was Raised, If At All, Only By The Trial Court, *Sua Sponte*, After A Verdict Had Been Returned And Respondent Had Filed Its Post-Trial Motions On Other Grounds

As aptly discussed by Judge Seymour in her dissenting opinion (App. 52-60), the panel decision in this case is contrary to prior decisions of the Tenth Circuit, as well as decisions of other jurisdictions, creating a conflict among the federal courts of appeals, is contrary to decisions of this Court, is contrary to the Federal Rules of Civil Procedure, and sanctions a departure by the District Court from the accepted and usual course of judicial proceedings of such nature as to call for the exercise of this Court's power of supervision. It further raises important issues under the Federal Rules of Civil Procedure and the United States Constitution that

should be settled by this Court. These matters amply justify the granting of this Petition for Writ of Certiorari.

Assuming, *arguendo*, that Kan.Stat.Ann. §44-119 requires a prior criminal conviction as a pre-requisite to civil liability, then the issue arises whether respondent waived its right to assert the defense of failure to plead and prove a prior criminal conviction on petitioner's blacklisting claim. This defense, if it was to be asserted by respondent, had to be asserted, at the latest, "at the trial on the merits". Fed.R.Civ.P. 12(h)(2); *Weatherhead v. Globe Int'l, Inc.*, 832 F.2d 1226, 1228 (10th Cir. 1987) ("[A] defense of dismissal is waived...when presented after trial."); *see also Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 356-57 (1st Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3217 (1990); *Brooks v. Monroe Sys. For Business, Inc.*, 873 F.2d 202, 205 (8th Cir.), *cert. denied*, ___ U.S. ___ 110 S.Ct. 154 (1989). At no time in this litigation, which was commenced on November 14, 1986 and decided by a jury on March 1, 1989, did respondent specifically or particularly raise the defense of failure to plead and prove a prior criminal conviction, nor did respondent file any dispositive motions. The issue was not raised by respondent in the Pretrial Order, despite

the fact that Rule 213(c) of the Local Rules of the United States District Court for the District of Kansas provides that the "pretrial order, when approved by the court and filed with the clerk, together with any memorandum entered by the court at the conclusion of the final pretrial conference, will control the subsequent course of the action...." Petitioner's claim of blacklisting was submitted to the jury in a three-element Instruction, none of which required the jury to find a prior criminal conviction, and this Instruction was submitted to the jury without objection from either party.

Further, as Judge Seymour noted,

> In accordance with settled authority, this court has clearly held that "[o]nly questions raised in a prior motion for directed verdict may be pursued in a motion for judgment notwithstanding the verdict." *Dow Chemical Corp. v. Weevil-Cide Co.*, 897 F.2d 481, 486 (10th Cir. 1990); *see Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1455 n.2 (10th Cir. 1987); 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶50.08 (2d ed. 1990). Here, of course, the ground upon which the district court

> granted j.n.o.v. was not raised by defendant in either its motion for directed verdict or its motion for j.n.o.v. Two other circuits have reversed the district court's grant of j.n.o.v. under similar circumstances. *See Kutner Buick, Inc. v. American Motors Co.*, 868 F.2d 614, 617 (3d Cir. 1989); *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 171-72 (5th Cir. 1985). If, as the majority asserts, the statute plainly requires a prior conviction, defendant has no excuse for not asserting the requirement in a timely fashion.

(App. 53.) As Judge Seymour also points out, those cases cited by the majority, seeking to avoid contravention of governing authority, which excused the lack of technical compliance with Fed.R.Civ.P. 50 (App.46-47), are distinguishable, as each involved circumstances under which both the parties and the district court had sufficient actual notice that the issue was part of the case prior to jury deliberation. (App. 53-54.) In this case, the issue of a prior criminal conviction was not raised until the District Court raised it, *sua sponte*, after the filing of respondent's post-trial Motion.

Moreover, respondent did not overcome waiver by its general allegations of insufficiency of the evidence. "[T]he law is clear that a general allegation of insufficiency does not preserve unarticulated specific arguments which might support that general assertion. *See, e.g., Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1279 (8th Cir. 1981); 9 C. Wright & A. Miller, *Federal Practice & Procedure*, §2533, at 579 (1971)...; *cf. Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 357 (1st Cir. 1989)..., *cert. denied*, 110 S.Ct. 3217 (1990); *Brooks v. Monroe Sys. For Business, Inc.*, 873 F.2d 202, 205 (8th Cir.)..., *cert. denied*, 110 S.Ct. 154 (1989)." (App. 55.) "The majority's broad view of 'lack of technical compliance'... simply swallows up...Rule [50(a)] itself." (App. 56.) It also prejudices petitioner in that respondent's failure to timely raise the prior criminal conviction issue obliged petitioner to incur the substantial expenses and expend the substantial effort associated with trial. (App. 56-57.)

Finally, Fed.R.Civ.P. 9(c) requires that the "denial of performance or occurrence [of conditions precedent] shall be made specifically and with particularity." In this case, respondent did not raise, as the omission of a required condition precedent, the lack of a

prior criminal conviction. As Judge Seymour stated, with reference to the Tenth Circuit:

> This court has specifically held that when a defendant does not plead nonperformance of a condition specifically and with particularity as required by Rule 9(c), the failure of the condition is not an issue in the case and will not be addressed by the court on appeal. *See Lumbermens Mut.. Ins. Co. v. Bowman*, 313 F.2d 381, 387 (10th Cir. 1963); *see also, Brooks v. Monroe Sys. for Business, Inc.*, 873 F.2d 202, 205 (8th Cir. 1989); *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1001, 1009 (11th Cir. 1982); *McKee-Berger-Manseuto v. Board of Educ.*, 626 F.2d 559, 562-63 (7th Cir. 1980); *Ginsberg v. Insurance Co. of N. Am.*, 427 F.2d 1318, 1321-22 (6th Cir. 1970).

(App. 57-58.)

The majority opinion below seeks to avoid the foregoing authority based on the conclusion that "the requirement of criminal liability is simply a statutory element that does not implicate Rule

9(c)." (App. 49.) However, assuming, *arguendo*, that a prior criminal conviction "is an element of Anderson's claim, the district court's ruling is necessarily grounded on Anderson's failure to state a claim upon which relief can be granted. *See*, Fed.R.Civ.P. 12(b)(6)." (App. 58.) However, under Fed.R.Civ.P. 12(h)(2), a defendant cannot raise, for the first time, the defense of failure to state a claim for relief "*after* trial on the merits. *Weatherhead v. Globe Int'l., Inc.*, 832 F.2d 1226, 1228 (10th Cir. 1987)...; *see also Brown*, 891 F.2d at 356-57 (citing cases); *Brooks*, 873 F.2d at 205." (Emphasis in original.) (App. 58.) "Accordingly, whether considered a condition precedent or an element of the cause of action, the issue cannot be raised for the first time post-trial. *See, Brooks*, 873 F.2d at 204-05"; *5A C. Wright & A. Miller, Federal Practice and Procedure* §1392 at 763 (2d ed. 1990).

The majority opinion of the Tenth Circuit is, thus, contrary to its own authority and that of the First and Eighth Circuits with respect to the waiver of a defense when presented after trial; is contrary to its own authority and that of the Third and Fifth Circuits in regard to the issue that only questions raised in a prior motion for directed verdict may be pursued in a motion for judgment notwithstanding

the verdict; is contrary to, for example, the Eighth and First Circuits with regard to the issue that a general allegation of insufficiency does not preserve unarticulated specific arguments which might support that general assertion; is contrary to its own authority and that of the Eighth, Eleventh, Seventh and Sixth Circuits concerning the fact that when a defendant does not plead non-performance of a condition precedent specifically and with particularity, as required by Rule 9(c), the failure of that condition precedent is not at issue in the case and will not be addressed by the court on appeal; and is contrary to the Federal Rules of Civil Procedure, which conflicts should be resolved by this Court. It further sanctions a trial court decision that is so far removed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision and raises important questions concerning the Federal Rules of Civil Procedure, as well as questions arising under the United States Constitution which should be settled by this Court. Accordingly, the Court should grant this Petition for Writ of Certiorari.

II. The Kansas Blacklisting Statute, If It Requires A Prior Criminal Conviction As A Prerequisite For Civil Liability, And In The Manner So Construed In This Case, Violates The Equal Protection Clause Of The Fourteenth Amendment And The Due Process Clause Of The Fifth Amendment To The United States Constitution And, If Subject To Two Different Interpretations In This Regard, One Constitutional and One Unconstitutional, Must Be Given The Interpretation That Is Constitutional

A criminal conviction being a prerequisite to the right to a civil remedy under the Kansas blacklisting statute would be constitutionally impermissible under the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution.[5] A private individual

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[5] "The federal constitutional guaranty of the equal protection of the law prevents the inequitable administration of the laws of a state by its own courts, on the one hand, and federal courts sitting within it, on the other. *Erie R. Co. v. Tompkins* (1938), 304 U.S. 64, 78, 58 S.Ct. 817, 822,

has absolutely no control over whether or not prosecution for a criminal, public wrong is commenced, tried or dismissed. Two plaintiffs having identical wrongs visited upon them could well have, through no lack of diligence on their part, redress for one and a total failure of redress for the other. *See, Darling v. Kansas Water Office*, 245 Kan. 45, 775 P.2d 171 (1989).

By analogy, this Court held, in *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S.479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), that a private civil action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968, which authorizes the recovery of treble damages by any person injured in his business or property by reason of a violation of the substantive provisions thereof, does not require the defendant's prior conviction of a statutory violation, or of the underlying predicate offenses, based upon that statute's history and language, as well as considerations of policy. There, Justice White, writing for the majority, stated:

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82 L.Ed. 1188, 1194...." *Zachery v. Wheeler*, 511 F.Supp. 591, 593 (E.D. Tenn. 1981).28

> Finally, we note that a prior-conviction requirement would be inconsistent with Congress' underlying policy concerns. Such a rule would severely handicap potential plaintiffs. A guilty party may escape conviction for any number of reasons-- not least among them the possibility that the Government itself may choose to pursue only civil remedies. Private attorney general provisions such as §1964(c) are in part designed to fill prosecutorial gaps. [Citation omitted.] This purpose would be largely defeated, and the need for treble damages as an incentive to litigate unjustified, if private suits could be maintained only against those already brought to justice.

Id., 473 U.S. at 493. More specifically, Justice White noted:

> It is worth bearing in mind that the holding of the court below is not without problematic consequences of its own. It arbitrarily restricts the availability of private actions, for lawbreakers are often not apprehended and convicted. Even if a

conviction has been obtained, it is unlikely that a private plaintiff will be able to recover for all of the acts constituting an extensive "pattern," or that multiple victims will all be able to obtain redress. This is because criminal convictions are often limited to a small portion of the actual or possible charges. The decision below would also create peculiar incentives for plea bargaining to non-predicate act offenses so as to ensure immunity from a later civil suit. If nothing else, a criminal defendant might plead to a tiny fraction of counts, so as to limit future civil liability. In addition, the dependence of potential civil litigants on the initiation and success of a criminal prosecution could lead to unhealthy private pressures on prosecutors and to self-serving trial testimony, or at least accusations thereof. Problems would also arise if some or all of the convictions were reversed on appeal. Finally, the compelling wait for the completion of criminal proceedings would result in

> pursuit of stale claims, complex statute of limitations problems, or the wasteful splitting of actions, with resultant claim and issue preclusion complications.

473 U.S. at 490 n. 9.

Moreover, if a statute is subject to two different interpretations, one constitutional and one unconstitutional, the statute must always be given the interpretation that is constitutional. As stated in 16 C.J.S. §96 at page 297 (and cases cited therein):

> It is a cardinal rule of construction that when reasonably possible, or practical, a statute must or will be so construed as to uphold its constitutionality, and not so construed as to endanger its validity, either in whole or in part. ... The duty of the Court, to this end, is to construe a statute, if possible, so as to effectuate the intent or purpose of the Legislature, as expressed in the statute, and statutes will, or should be liberally or reasonably construed so as to sustain their constitutionality or validity.

Petitioner respectfully suggests that the intent of the Legislature of Kansas has been, and continues to be, crystal clear in having *separate and distinct* remedies for blacklisting-- a civil remedy and a criminal remedy. Petitioner further contends that the statutory law of the State of Kansas prohibits the merger of the civil wrong into the criminal wrong. *State v. Ragland*, 171 Kan. 530, 233 P.2d 740 (1951).[6] Moreover, a statutory construction that would require a conviction for a criminal act as a mandatory prerequisite to a plaintiff's civil remedy would make the statute unconstitutional, and a construction of the statute that would endanger its validity must not be made if it is reasonably possible to construe it otherwise.

If, indeed, the civil redress for a personal wrong is conditional upon the discretion of the State, dutiful, whimsical, benevolent or lackadaisical, from instance to instance, there is no right and there is no remedy. Rights that are not available to all equally are not rights,

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[6] Petitioner will, in his Brief on the merits, demonstrate beyond doubt that a prior criminal conviction requirement, as a prerequisite for civil liability, is not supported by the Kansas blacklisting statute's history, its language or considerations of policy.

but mere privileges. Such is not in the public interest, is not what the Kansas Legislature intended, and is not that which is constitutionally permissible. The statute in question, Kan.Stat.Ann. §44-119, should be afforded its substantial and important public purpose, that blacklisting be prohibited and, when it occurs, it must, and should be, remedied through recovery of civil damages by the person injured. To emasculate the civil remedy, which flows from the civil wrong, by making it dependent upon prior criminal conviction, is wholly inconsistent with the historic and still compelling need to protect the employment rights of individuals against their powerful employers. It also works, under color of State action, to permanently deprive aggrieved individuals of a substantial property interest in contravention of legitimate governmental purposes and public policy. *See, e.g., Craig v. Carson*, 449 F.Supp. 385, 390 (M.D. Fla. 1978).

In addition to the foregoing, the Opinion below sanctions a decision by the District Court that is contrary to prior decisions of this Court and, by failure to certify the statutory interpretation issue herein involved to the Supreme Court of Kansas, deprives petitioner of his due process rights.

Justice Brandeis, in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 58 S.Ct. 817, 822, 82 L.Ed. 1188, 1194 (1938), wrote:

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. ..."I am aware that what has been termed the general law of the country-- which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject-- has been often advanced in judicial opinions of this court.... But, not withstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of

> the states-- independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence. [Quoting Justice Field in *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401, 13 S.Ct. 914, 927, 37 L.Ed. 772, 786 (1893).]

By interpreting the Kansas blacklisting statute to require a criminal conviction as a prerequisite for civil liability, an issue of first impression in the Kansas state courts (App. 63-64), the District Court below engaged in "[s]upervision over...the legislative action of the "State of Kansas, contrary to this Court's prior decisions. Moreover, in doing so without certifying or allowing for certification of this issue of first impression to the Supreme Court of Kansas, pursuant to the provisions of the Kansas Uniform

Certification of Questions of Law Act, Kan. Stat. Ann. 60-3201, *et seq.*, which specifically allows for certification by United States district courts, it, again, deprived petitioner of his due process rights. The District Court simply failed to provide this procedural safeguard and, instead, opted to improperly impose what it thought, at the time, should be the construction of the Kansas blacklisting statute.

Again, this case presents important questions of constitutional law which should be settled by this Court and the decision below is contrary to prior decisions of this Court and sanctions such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. As a result, this Petition for Writ of Certiorari should be granted.

CONCLUSION

As set forth herein, this case presents special and important issues, of national importance, which should be addressed by this Court. Petitioner respectfully prays, therefore, that the Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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September 4, 1991

APPENDIX

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
May 6, 1991
ROBERT L. HOECKER
Clerk

DENVER EARL ANDERSON,	)	
	)	
Plaintiff-Appellant,	)	
v.	)	No. 89-3152
	)	
UNITED TELEPHONE COMPANY OF KANSAS,	)	
	)	
Defendant-Appellee.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. NO. 86-2511-O)

Kelly L. McClelland, Hale, Kincaid, Waters & Allen, P.C., Liberty, Missouri; and Benjamin F. Farney, Law Offices of Benjamin F. Farney, Overland Park, Kansas, for Plaintiff-Appellant.

Arlyn D. Haxton (Jennifer A. Putman with him on the brief), of Armstrong, Teasdale, Schlafly, Davis & Dicus, Kansas City, Missouri, for Defendant-Appellee.

Before SEYMOUR, TACHA, and BRORBY, Circuit Judges

TACHA, Circuit Judge.

Plaintiff-appellant Denver Anderson appeals a district court order granting a motion for judgment notwithstanding the verdict in favor of defendant-appellee United Telephone Company of Kansas (UTC). On appeal, Anderson argues the district court erred by finding a criminal blacklisting conviction is required for civil blacklisting liability. Anderson also argues the district court erred in granting a judgment for UTC because UTC did not base the motion for judgment n.o.v. on the same grounds raised in the motion for directed verdict. We exercise jurisdiction under 28 U.S.C. §1291 and affirm.

Anderson was terminated from his employment with UTC in November 1985. In December 1985, he interviewed with United

Telephone Company of Missouri, a company affiliated with UTC. He was not offered employment with that company. Anderson also was denied employment with Installation Technicians, Inc., a company that has contracted with UTC for telephone installation. Anderson ultimately brought suit against UTC in federal district court, alleging civil blacklisting in violation of title 44, section 119 of the Kansas Statutes; age discrimination and retaliation in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq.; breach of an implied employment contract; and fraud. Anderson concedes UTC has not been prosecuted for criminal blacklisting.

At the close of Anderson's case at trial, UTC moved for a directed verdict on the five claims. The district court entered judgment for UTC on the fraud claim. At the close of all the evidence, UTC moved for a directed verdict on the remaining claims. UTC specifically argued the evidence was insufficient to support a claim for civil blacklisting under section 44-119. The court deferred ruling on UTC's motion for directed verdict and submitted the case to the jury. The jury found in favor of UTC on the age discrimination, retaliation, and breach of contract claims. On

the civil blacklisting claim, however, the jury returned a verdict for Anderson and awarded damages.

Following the jury verdict, UTC filed a motion for judgment n.o.v. and a motion for a new trial on the blacklisting claim, again arguing the evidence is insufficient to support a jury verdict against UTC for civil blacklisting. In a supplemental brief supporting the motion for judgment n.o.v., UTC argued Anderson's failure to introduce evidence that UTC had been convicted of criminal blacklisting precluded recovery for civil blacklisting. Anderson filed a motion for new trial on the breach of contract claim. The court ultimately denied Anderson's motion for a new trial on the breach of contract claim but granted UTC's motion for judgment n.o.v. on the blacklisting claim.

Anderson contends a criminal conviction under sections 44-117 and 44-118 is not required for civil liability under section 44-119. We review this question of statutory interpretation de novo. See Stissi v. Interstate & Ocean Transp. Co., 765 F.2d 370, 374 (2d Cir. 1985); United States v.Horowitz, 756 F.2d 1400, 1403 (9th Cir.), cert. denied, 474 U.S. 822 (1985). In 1987, the Kansas

legislature enacted the blacklisting law at issue in this case. The statute states:

> Any employer of labor in this state, after having discharged any person from his service, shall not prevent or attempt to prevent by word, sign or writing of any kind whatsoever any such discharged employee from obtaining employment from any other person, company or corporation, except by furnishing in writing, on request, the cause of such discharge.

Kan. Stat. § 44-117 (1986). The statute establishes criminal penalties for a blacklisting violation:

> Any employer of labor, his agent or employee, who shall violate the provisions of this act shall be guilty of a misdemeanor, and shall upon conviction be fined for each offense the sum of one hundred dollars and thirty days' imprisonment in the county jail.

Id. § 44-118. The stattute also provides for civil penalties:

> Any person, firm or corporation found guilty of the violation of this act, shall be liable to the party injured to

> an amount equal to three times the sum he may be injured, and such employers of labor shall also be liable for a reasonable attorney fee, which shall be taxed as part of the costs in the case.

Id. § 44-119 (emphasis added).

In discerning the Kansas legislature's intent in section 44-119, we first look to the statutory language. Mead Corp. v. Tilley, 490 U.S. 714, 722 (1989); Watt v. Alaska, 451 U.S. 259, 265-66 (1981). Legislative purpose generally is expressed in the ordinary meaning of the words the legislature has used. See United States v. Locke, 471 U.S. 84, 95 (1985); Perrin v. United States, 444 U.S. 37, 42 (1979). Further, the legislature's use of two different terms is presumed to be intentional. National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 172 (D.C. Cir. 1982) (citing Russell v. Law Enforcement Assistance Admin. of the United States, 637 F. 2d 354 (5th Cir. Unit A Feb. 1981)).

Here, an examination of the statutory language indicates a criminal blacklisting conviction is required for civil recovery under section 44-1119. The statute states: "Any . . .corporation found guilty of the violation of this act, shall be liable to the party injured. .

. ." 44 Kan. Stat. §44-119. In this provision, the legislature specifically used the terms "guilty" and "liable." Presuming the use of both terms to be intentional, we construe these terms in an ordinary way to mean criminal guilt and civil liability. When these terms are regarded in the context of the entire provision, we are convinced the Kansas legislature meant a corporation shall "be liable" only when it has been "found guilty" of criminal blacklisting. Based on the plain language of the statute, we hold a criminal blacklisting conviction is an element of a civil blacklisting claim against an employer under Kansas law.

Anderson contends the district court erred in granting judgment for UTC because UTC did not base the motion for judgment n.o.v. on the same grounds raised in the motion for directed verdict. Rule 50(b) states: "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." According to Rule 50 (a), "[a] motion for a directed verdict shall state the specific grounds therefor." A motion for judgment n.o.v. cannot assert new matters not presented in the motion for directed

verdict. Dow Chemical Corp. v. Weevil-Cide Co., 897 F.2d 481, 486 (10th Cir. 1990); United States v. Fenix & Scisson, Inc., 360 F. 2d 260, 265 (10th Cir. 1966), cert. denied, 386 U.S. 1036 (1967).

This court has recognized that in satisfying the requirements of Rule 50, technical precision is unnecessary. Fenix & Scisson, 360 F. 2d at 266. Because the requirement of Rule 50 that a directed verdict motion must precede a motion for judgment n.o.v. is "'harsh in any circumstance[],'" a directed verdict motion should not be reviewed narrowly but rather in light of the purpose of the rules to secure a just, speedy, and inexpensive determination of a case. 9 C. Wright & A. Miller, Federal Practice and Procedure § 2537, at 597 n.32 (1971) (quoting Mosley v. Cia. Mar. Adra S.A., 362 F.2d 118, 121-22 (2d Cir. 1966), cert. denied, 385 U.S. 933 (1967)); see also National Indus., Inc. v. Sharon Steel Corp., 781 F.2d 1545, 1549 (11th Cir. 1986) (taking liberal view because "rule is a harsh one"). As the Fourth Circuit has noted, "rigid application of this rule is inappropriate. . . where such application serves neither of the rule's rationales--protecting the Seventh Amendment right to trial by jury, and ensuring that the opposing party has enough notice of

the alleged error to permit an attempt to cure it before resting." FSLIC v. Reeves, 816 F.2d 130, 138 (4th Cir. 1987); see also McCarty v. Pheasant Run, Inc. 826 F.2d 1554, 1556 (7th Cir. 1987) (modern rationale of rule is opposing party should have opportunity to rectify deficiencies in evidence presented to jury before it is too late); Miller v. Rowan Cos., 815 F.2d 1021, 1024 n.4, 1025 (5th Cir. 1987) (aims of rule include avoiding trapping plaintiff after submittal to jury because he cannot then cure defects in proof and securing fair trial); Lifshitz v. Walter Drake & Sons, Inc., 806 F.2d 1426, 1429 (9th Cir. 1986) (purpose of directed verdict motion is to provide notice of claimed evidentiary insufficiencies and preserve issue of sufficiency of evidence as question of law); Sharon Steel Corp., 781 F.2d at 1549 (purpose of directed verdict requirement is to avoid ambushing court and opposing party after the verdict so that only remedy is completely new trial) (citing Quinn v. Southwest Wood Prods., Inc., 597 F.2d 1018, 1025 (5th Cir. 1979)); Acosta v. Honda Motor Co., 717 F.2d 828, 831-32 (3d Cir. 1983) (same) (citing Wall v. United States, 592 F.2d 154 (3d Cir. 1979)).

Here, UTC moved for a directed verdict on the blacklisting claim after Anderson had presented his case at trial. At the close of all the evidence, UTC again moved for a directed verdict on the blacklisting claim. In this directed verdict motion, UTC specifically argued there was insufficient evidence to support a claim for civil blacklisting under section 44-119. Following the jury verdict, UTC filed a motion for judgment n.o.v. and a motion for new trial on the grounds the evidence was insufficient to support the civil blacklisting claim. Because UTC raised insufficiency of the evidence on the blacklisting claim as specific grounds for both the motion for directed verdict and the motion for judgment n.o.v., we hold UTC has complied with the requirements of Rule 50.

Anderson argues Rule 50 demands that UTC must have stated in the directed verdict motion the evidence is insufficient to prove the element of a criminal blacklisting conviction. Although Rule 50(a) requires a motion for directed verdict to state the "specific grounds," the rule does not define how specific the grounds must be. We are convinced that UTC's directed verdict motion satisfies the rule's requirement. To be sure, a more specific motion may be upheld. See, e.g., Acosta, 717 F.2d at 832; Thezan v. Maritime Overseas

Corp., 708 F.2d 175, 179 n.2 (5th Cir. 1983), cert. denied, 464 U.S. 1050 (1984). However, a significant number of the cases interpreting Rule 50's specificity requirement have accepted less specificity in directed verdict motions. See, e.g. Sharon Steel, 781 F.2d at 1548-49 (motion raising issue of sufficiency of evidence for liability, damages, and future lost profits sufficient to raise sufficiency of evidence of injury to goodwill and reputation); Stewart v. Thigpen, 730 F.2d 1002, 1006 n.2 (5th Cir. 1984) (motion requesting "the verdict be directed in the plaintiff's favor and award damages to the plaintiff" sufficient when parties and court understood basis for motion was sufficiency of evidence to support claim); Acosta, 717 F.2d at 832 (motion raising sufficiency of evidence for "Counts I and the remaining counts" under theories of strict liability and negligence sufficient to raise issue of punitive damages); Cortez v. Life Ins. Co. of America, 408 F.2d 500, 503 (8th Cir. 1969) (motion based on lack of grounds for liability sufficient).

Because Rule 50 (a) does not itself define "specific grounds," we must determine in each case whether the purposes the rule embodies have been served. See Acosta, 717 F.2d at 832 ("communicative

content, 'specificity' and notice-giving function of an assertion [in a directed verdict motion] should be judged in context"); see also K. Llewellyn, The Bramble Bush 157-58 (1960) ("[T]he rule follows where its reason leads; where the reason stops, there stops the rule."); cf. Benson v. Allphin, 786 F.2d 268, 274 (7th Cir.), cert. denied, 479 U.S. 848 (1986) (construing Rule 50(b) liberally to serve rule's purpose).

We believe requiring more specificity in this case would be harsh and run contrary to the policy favoring a liberal application of the rules to allow correction of evidentiary shortcomings and provide a just and efficient determination of the case. More specific notice would be useless here because there is no possibility Anderson could have corrected the evidentiary shortcoming during trial. Like the Fourth Circuit in Reeves, we refuse to reverse the district court's judgment and grant a new trial based on an alleged procedural error that did not prejudice the plaintiff in any way. 816 F.2d at 138; see also Benson, 786 F.2d at 274 (because question of qualified immunity is addressed to court, not jury, strict compliance with Rule 50 not necessary when no prejudice involved). The defendant here raised the defense of failure to state a claim for blacklisting at the

first opportunity in the answer to the complaint. Clearly, Anderson's right to a jury trial and possible lack of notice of the deficiency of the blacklisting claim did not prejudice him. Further, granting Anderson a new trial on the blacklisting claim would defeat the rule's objective of ensuring a just and efficient determination since the record shows Anderson cannot prove he is entitled to relief based on our interpretation of section 44-119.

Anderson finally contends UTC waived the defense of failure to plead and prove a condition precedent--here, a criminal conviction under section 44-118--by not pleading it with the specificity and particularity Rule 9(c) of the Federal Rules of Civil Procedure requires. Although the district court labeled the criminal conviction requirement a "condition precedent," thereby apparently implicating the special pleading requirements of Rule 9(c), we reject this characterization.

We are convinced the requirement of criminal liability is simply a statutory element that does not implicate Rule 9(c). Rule 9(c) requires: "A denial of performance or occurrence [of conditions precedent] shall be made specifically and with particularity." This special pleading requirement has been applied to conditions

precedent in common law contracts claims and nonjurisdictional agency exhaustion requirements in some federal statutory claims. See, e.g., McKee-Berger-Mansueto, Inc. v. Board of Educ., 626 F.2d 559, 562-63 (7th Cir. 1980) (lack of specific statements in pleadings contesting adequacy of company's performance of contract for construction management services implicates Rule 9(c)); Ginsburg v. Insurance Co. of N.Am., 427 F.2d 1318, 1321-22 (6th Cir. 1970) (failure to specifically deny timely filing of proof of loss in insurance contract implicates Rule 9(c)); Lumbermens Mut. Ins. Co. v. Bowman, 313 F.2d 381, 387 (10th Cir. 1963) (proof of loss is condition precedent to enforcement of insurance contract); Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 999 n.7, 1000-01 (11th Cir. 1982) (failure to allege in pleadings exhaustion of administrative remedies implicates Rule 9(c)). We find no indication in the rules or the case law that the special pleading requirements of Rule 9(c) were meant to apply more broadly to pleading the basic elements of a cause of action. Cf. EEOC v. Klinger Elec. Corp., 636 F.2d 104, 106-07 (5th Cir. Unit A Feb. 1981) (federal statute requiring "proper averment in [EEOC's] complaint that conciliation has failed" creates condition precedent

subject to Rule 9(c)). Although we acknowledge the proof of all statutory elements may be described loosely as a precondition to recovery, we conclude the statutory requirement of criminal blacklisting is not a condition precedent as contemplated by Rule 9(c).

Much of the confusion in this case rises from the fact the plaintiff simply failed to offer evidence at trial entitling him to relief. We refuse to find the defendant acquired responsibility to notify the court of specific factual shortcomings beyond raising the issue of sufficiency of the evidence on the blacklisting claim in the motions for directed verdict and judgment n.o.v. When there have been no procedural violations, the benefit of hindsight will not cause us to conclude the defendant must suffer from both parties' failure to sharpen for the court the specific legal question of the statutory requirements of section 44-119. Under the facts of this case, we see nothing improper in the determination of this specific legal question post-verdict in the hearing on the judgment n.o.v. when it did not affect the factual determinations or weighing of the evidence on the issues before jury. In the interests of fairness to the parties and judicial efficiency, we AFFIRM.

No. 89-3152, Denver Earl Anderson v. United Telephone Company of Kansas

SEYMOUR, Circuit Judge, dissenting.

I must respectfully dissent. In my view the district court's actions here violated the Federal Rules of Civil Procedure in at least two respects. The majority upholds this conduct by engaging in circular reasoning under which the lack of compliance with one rule is somehow excused by noncompliance with another.

First, the grant of judgment n.o.v. in this case was a clear abuse of discretion under the case law of this and other circuits. The district court based its judgment on Anderson's failure to establish a prior criminal conviction for blacklisting, an element that the court viewed as a prerequisite for civil liability under the Kansas statute. The majority agrees with the district court's construction of this statute, stating that the statute's plain language requires proof of a criminal conviction. Notwithstanding this plain language, defendant did not originally move for either a directed verdict or j.n.o.v. on this ground. Indeed the district court raised the issue sua sponte after the jury had returned a verdict and after defendant had filed its post-trial motions on other grounds.

In accordance with settled authority, this court has clearly held that "[o]nly questions raised in a prior motion for directed verdict may be pursued in a motion for judgment notwithstanding the verdict." Dow Chemical Corp. v. Weevil-Cide Co., 897 F.2d 481, 486 (10th Cir. 1990); see Karns v. Emerson Elec. Co., 817 F.2d 1452, 1455 n.2 (10th Cir. 1987); 5A J. Moore & J. Lucas, Moore's Federal Practice ¶ 50.08 (2d ed. 1990). Here, of course, the ground upon which the district court granted j.n.o.v. was not raised by defendant in either its motion for directed verdict or its motion for j.n.o.v. Two other circuits have reversed a district court's grant of j.n.o.v. under similar circumstances. See Kutner Buick, Inc. v. American Motors Corp., 868 F.2d 614, 617 (3d Cir. 1989); Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 171-72 (5th Cir. 1985). If, as the majority asserts, the statute plainly requires a prior conviction, defendant has no excuse for not asserting the requirement in a timely fashion.

The majority seeks to avoid the fact that the court's grant of j.n.o.v. here clearly contravened governing authority by attempting to bring this case within a line of opinions excusing lack of technical compliance with Fed. R. Civ. P. 50. In so doing the

majority is wrong on the record and the law. The cases upon which it relies that do not require technical compliance, see Maj. op. at 8, are readily distinguishable because they involve circumstances where the parties and the district court had adequate actual notice that the issue was in the case prior to jury deliberation. It is undisputed on this record that the need for a prior criminal blacklisting conviction was not anticipated or addressed by either party until the court raised it sua sponte after defendant's post-trial motion had been filed. [1] The alleged requirement was simply not an issue in the case until that point.

Indeed, defendant's motion for directed verdict and its original motion for j.n.o.v. made only general allegations that the evidence was insufficient as a matter of law to support the blacklisting claim. Neither motion specifically raised the lack of evidence of a prior blacklisting conviction. "A motion for a directed verdict shall state

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[1] The majority states that "[t]he defendant here raised the defense of failure to state a claim for blacklisting at the first opportunity in the answer to the complaint." Maj. op. at 9. Of course, all defendant asserted was '[t]that Count V of plaintiff's Complaint fails to state a cause of action upon which relief may be granted against this defendant." Separate Answer of Defendant United Telephone Company of Kansas at 17. Defendant did not specify any failure it might have had in mind. The undeniable fact is that defendant never raised the issue on which the majority grants relief. The district court itself raised it post-trial.

the specific grounds therefore." Fed. R. Civ. P. 50 (a) (emphasis added). In the face of Rule 50 (a), the majority would hold that a general assertion of insufficient evidence preserves an argument that the evidence is insufficient in a particular respect. However, the law is clear that a general allegation of insufficiency does not preserve unarticulated specific arguments which might support that general assetion. See, e.g., Superturf, Inc. v. Monsanto Co., 660 F.2d 1275, 1279 (8th Cir. 1981); 9 C. Wright & A. Miller, Federal Practice & Procedure § 2533, at 579 (1971) ("A request for an instruction that 'on the basis of the evidence and the applicable law, you are directed to find a verdict for the plaintiff' is not sufficient compliance with [Rule 50(a)]."); cf. Brown v. Trustees of Boston Univ.,891 F.2d 337, 357 (1st Cir. 1989) ("A general defense that the complaint fails to state a claim ordinarily will not preserve unarticulated arguments in support of that defense."), cert. denied, 110 S. Ct. 3217 (1990); Brooks v. Monroe Sys. for Business, Inc., 873 F. 2d 202, 205 (8th Cir.) (same), cert. denied, 110 S. Ct. 154 (1989).

While technical compliance with Rule 50(a) may not be necessary in some circumstances, the majority's position here

relieves a prty from any compliance at all. Under the majority's holding, a defendant who moves for a directed verdict by merely asseting generally that the evidence is insufficient is thereafter free to raise any more specific argument for the first time after trial. The majority's broad view of "lack of technical compliance" thus simply swallows up the Rule itself.

Nor can I agree with the majority's conclusion that affirming the district court is justified because Anderson will have suffered no prejudice. It is true that whether a prior conviction is an element of Anderson's claim is a legal issue that would not have gone to the jury in any event. Thus Anderson has suffered no prejudice to his right to a jury trial. See Benson v. Allphin, 786 F.2d 268, 273-74 (7th Cir. 1986). Morever, it is undisputed that Anderson cannot establish a prior criminal conviction, so his lack of notice before the verdict was returned did not prejudice his ability to remedy the deficiency prior to jury deliberation. Id. at 273-75. Nevertheless, it is not accurate to state, as the majority does, that Anderson was therefore not prejudiced in any way. The "failure to raise the claim in a timely fashion obliged [Anderson] to expend the effort and expense of a trial and numerous post-trial motions which might have

been avoided had the claim" been timely raised and decided favorably to defendant. Weaver v. Bowers, 657 F.2d 1356, 1362 (3d Cir. 1981) (en banc). As a practical matter, such prejudice is real and substantial, and of the type that the waiver principles embodied in the Rules were designed to prevent.

Finally, the majority acknowledges that the district court labeled the requirement a condition precedent and that defendant did not comply with Fed. R. Civ. P. 9(c), which requires that the "denial of performance or occurrence [of conditions precedent] shall be made specifically and with particularity." Defendant here, of course, did not raise the lack of a criminal conviction as the omission of a required condition precedent. This court has specifically held that when a defendant does not plead nonperformance of a condition specifically and with particularity as required by Rule 9(c), the failure of the condition is not an issue in the case and will not be addressed by the court on appeal. See Lumbermens Mut. Ins. Co. v. Bowman, 313 F.2d 381, 387 (10th Cir. 1963); see also Brooks v. Monroe Sys. for Business, Inc., 873 F.2d 202, 205 (8th Cir. 1989); Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1001, 1009 (11th Cir. 1982); McKee-Berger-Mansueto v. Board of Educ.,

626 F.2d 559, 562-63 (7th Cir. 1980); Ginsburg v. Insurance Co. of N. Am., 427 F.2d 1318, 1321-22 (6th Cir. 1970).

The majority seeks to avoid the import of these cases by concluding that "the requirement of criminal liability is simply a statutory element that does not implicate Rule 9(c)." Maj. op. at 10. Even if I were to agree with the above statement, it does not support the majority's conclusion that the lack of the requirement may be raised for the first time after trial. If, as the majority asserts, a prior conviction is an element of Anderson's claim; the district court's ruling is necessarily grounded on Anderson's failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). Rule 12(h)(2), however, provides that "[a] defense of failure to state a claim upon which relief can be granted. . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." (Emphasis added). The failure to state a claim for relief cannot be raised for the first time after trial on the merits. Weatherhead v. Globe Int'l., Inc., 832 F.2d 1226, 1228 (10th Cir. 1987) ("[A] defense of dismissal is waived. . .when presented after trial."); see also Brown, 891 F.2d at 356-57 (citing cases); Brooks, 873 F.2d at 205.

> "According to the plain language of Rule 12(h)(2), the [defense of failure to state a claim is] waived if [it is] not presented before the close of trial. Thus, for example, [it] may not be asserted for the first time on appeal. Nor can [this defense] be asserted through any type of post-trial motion."

5A C.Wright & A. Miller, Federal Practice & Procedure § 1392, at 763 (2d ed. 1990) (footnote omitted) (emphasis added. Accordingly, whether considered a condition precedent or an element of the cause of action, the issue cannot be raised for the first time post-trial. See Brooks, 873 F.2d at 204-05.

In sum, I cannot concur in an opinion under which district courts are free to raise unpled issues sua sponte and out of time, in derogation of the pleading requirements of the federal rules. This case is like any other in which a party's failure to comply with the rules renders unavailable an issue that might otherwise be dispositive. The majority's approval of the district court's action resolving the case on what the district court believed ought to have been pled, rather than on the issues actually raised at trial, renders

meaningless the rules meant to govern the orderly administration of justice.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS
MAY 22 1:29 PM '89
RALPH L. DeLOACH, CLERK
BY _____ DEPUTY
AT KANSAS CITY, KS.

DENVER EARL ANDERSON, Plaintiff, v. UNITED TELEPHONE COMPANY OF KANSAS, Defendant.	)	CIVIL ACTION NO. 86-2511-O

MEMORANDUM AND ORDER

This matter is before the court on defendant's motion for judgment notwithstanding the verdict or for new trial and plaintiff's motion for new trial on his breach of contract claim.[1] The case was tried to a jury on February 21-24, 27-28, and March 1, 1989, with a verdict in plaintiff's favor returned on his claims of "blacklisting" under K.S.A. 44-117 et seq.

The standards governing a motion for judgment n.o.v. are clear:

---

[1] Plaintiff also filed a motion for entry of judgment. In light of our disposition of the other motions, however, said motion is moot and hereby denied.

> Motions for a directed verdict and for judgment n.o.v. are considered under the same standard. The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party. We must view the evidence in the light most favorable to... the party against whom the motions were made.

Mackey v. Burke, 751 F.2d 322, 324-25 (10th Cir. 1984) (citations and internal quotations marks omitted).

In the instant case, the jury found in plaintiff's favor on his claims under the Kansas "blacklisting" statute, K.S.A. 44-117 et seq.. With respect to defendant's motion for judgment n.o.v., therefore, the issue is whether defendant is entitled, as a matter of law, to judgment on that claim. In Parker v. AT&T Technologies, Inc., No. 85-2558-O (D. Kan., unpublished, September 26, 1986, available on LEXIS, Genfed library, Dist file), we stated that

Section 44-117 of the Kansas Statutes Annotated prohibits an employer from preventing or attempting to prevent a discharged employee from obtaining employment, except by furnishing a written statement of the cause of discharge upon request. Anyone who violates this statute can be found guilty of a misdemeanor, punishable by a fine and imprisonment under K.S.A. 44-118. Finally, K.S.A. 44-119 provides as follows:

> Any person, firm or corporation found guilty of the violation of this act, shall be liable to the party injured to an amount equal to three times the sum he may be injured, and such employers of labor shall also be taxable for a reasonable attorney fee, which shall be taxed as part of the costs in the case.

Id. (emphasis added).

These "blacklisting" provisions were enacted eighty-nine years ago, but there appears to be no

> cases interpreting the statutes. However, the plain wording of K.S.A. 44-119 requires the employer to be "found guilty" of blacklisting an employee before liability for treble damages arises. Since the plaintiff has failed to allege any conviction under the blacklisting statutes, there can be no civil liability under K.S.A. 44-119, and plaintiff's claim under K.S.A. 44-117 to -119 fails to state a claim upon which relief can be granted.

Id., slip. op. at 9-10. Similarly, in Jonker v. Melvin Simon and Assoc's. Inc. et al., No. 86-1654-C (D. Kan., unpublished, March 1, 1989), 1989 U.S. Dist. LEXIS 3259, Judge Crow of this court, in holding that a criminal conviction under the Kansas statute was a prerequisite to civil liability stated that, "[t]his court agrees the plain wording of K.S.A. 44-119 allows the award of a civil remedy against an employer 'found guilty' of violating the Act." Id. at 26.

Defendant moves for judgment n.o.v. on plaintiff's blacklisting counts on the basis that they do not state claims upon which relief may be granted, inasmuch as plaintiff has shown no prior criminal conviction under K.S.A. 44-117 et seq.. Defendant has not, prior

to this motion, raised the necessity of a prior criminal conviction. Plaintiff responds that defendant has waived its right to move for judgment n.o.v. on this basis because, as a condition precedent to liability, defendant was obliged to deny with particularity the existence of a criminal conviction, at the latest, at the time of trial. Fed. R. Civ. P. 9(c), 12(h)(2). Because defendant, by way of general denial, merely alleged that plaintiff failed to state a claim upon which relief could be granted, plaintiff argues, it may not now rely upon the lack of the condition precedent to support its motion for judgment n.o.v.

Federal Rule of Civil Procedure 9(c) states

> In pleading the performance of or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

Plaintiff is correct that a general denial is insufficient to raise a triable issue as to a condition precedent, once it has been alleged that all such conditions have been met. Lumbermen's Mut. Ins. Co. v.

Bowman, 313 F.2d 381 (10th Cir. 1963). However, that is not the situation in the case at bar. Nowhere in his pleadings does plaintiff state that all conditions precedent have occurred. Therefore, Rule 9(c) is inapplicable and defendant was not required to make more than a general denial of the legal sufficiency of plaintiff's claim. That is, given plaintiff's failure to comply with Rule 9(c), defendant's general denial, contained in its answer, was adequate to preserve the defense of failure to state a claim, and that defense is now properly before the court.

In holding as we do, the court declines to follow the decision of the Eighth Circuit in Brooks v. Monroe Systems for Business, Inc., No. 88-1917 (8th Cir. April 26, 1989). In that case, the court stated that

> We view the administrative filing requirement as a condition precedent to suit subject to the pleading requirements of Rule 9(c) of the Federal Rules of Civil Procedure. Stearns v. Consolidated Management, Inc., 747 F.2d 1105, 1110-11 (7th Cir. 1984). For a plaintiff to properly plead performance of conditions precedent, "it is

> sufficient to aver generally that all conditions precedent have been performed or have occurred." Fed R. Civ. P. 9(c). Brooks' complaint does not allege that the requisite administrative filing has been made. Monroe, however, ignored the Rule's plain requirement that "denial of performance or occurrence shall be made specifically and with particularity." Id.

Slip. op. at 4. Implicitly concluding that two wrongs make a right, the court went on to hold that the defendant's failure to deny in accordance with Rule 9(c), before its motion for judgment n.o.v., constituted a waiver of its defense pursuant to Rule 12(h)((2).

We believe the rule enunciated in Brooks is analytically unsound for a very basic reason. The Brooks court, without citation to authority, effectively eliminates any requirement of averring that conditions precedent have occurred or been performed. Rule 9(c)'s burden of pleading such occurrence, though minimal and perhaps even perfunctory, nevertheless exists and this court declines to unilaterally read it out of the rules of procedure. In view of the fact that plaintiff introduced no evidence that defendant was convicted in

a criminal proceeding of blacklisting him, the court concludes that defendant is entitled, as a matter of law, to judgment n.o.v. on the blacklisting claims.

As to plaintiff's motion for new trial on the breach of contract claim, the decision is within the sound discretion of the trial judge. Community Nat'l Life Ins. Co. v. Parker Square Sav. & Loan Ass'n, 406 F.2d 603, 605 (10th Cir. 1969). Plaintiff contends that the jury should have been instructed that plaintiff's implied employment contract provided that he could be terminated only for just cause, given every opportunity to succeed in his job. Plaintiff argues that the court's instruction (and, indeed, plaintiff's own proposed instruction) was prejudicial in that it required him to prove that he was satisfactorily performing his job functions at the time of his termination. Thus, plaintiff's objection is to the characterization of defendant's obligation to him under the alleged contract.

Plaintiff's objection is without merit for two reasons. First, the distinction between termination for "unsatisfactory" job performance and termination for "just cause, given every opportunity to succeed" is without a difference. That is, the court's instruction was broad enough to include that which plaintiff now proposes, especially in

light of the substantial evidence that plaintiff was given numerous opportunities to improve his job performance.

The second difficulty with plaintiff's position is that the court permitted counsel to read to the jury a stipulation stating, inter alia,

> That it is the policy of United Telephone Company of Kansas to not terminate an employee without just cause, given every opportunity to succeed in his job.

The court specifically informed the jury that the statements contained in the stipulation should be accepted by them as established facts in the case. Thus, the court made clear the precise nature of the obligation defendant owed to plaintiff and it was incumbent upon plaintiff to impress upon the jury the significance, if any, of that obligation. In sum, plaintiff has failed to show any meaningful distinction between the court's instruction and what plaintiff now proposes. Moreover, even if there is any difference, plaintiff has failed to show that he was prejudiced by it. Accordingly, the motion for new trial is without merit.

IT IS THEREFORE ORDERED that defendant's motion for judgment notwithstanding the verdict is granted.

IT IS FURTHER ORDERED that plaintiff's motion for new trial on the breach of contract claim is denied.

Dated this 22nd day of May, 1989, at Kansas City, Kansas.

/s/ Earl E. O'Connor
EARL E. O'CONNOR, Chief Judge

UNITED STATES COURT OFF APPEALS
FOR THE TENTH CIRCUIT

DENVER EARL ANDERSON,	)	
	)	
Plaintiff - Appellant,	)	
	)	No. 89-3152
v.	)	
	)	
UNITED TELEPHONE COMPANY OF KANSAS,	)	
	)	
Defendant - Appellee.	)	

ORDER

Filed June 6, 1991

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

This matter comes on for consideration of appellant's suggestion for rehearing en banc, which the court treats as a petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to

all of the judges of the court who are in regular active service. A poll was taken and the suggestion for rehearing en banc is also denied. Judges McKay, Logan and Seymour would grant rehearing en banc.

Entered for the Court

ROBERT L. HOECKER, Clerk

By /s/Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FILED
MAR 01 1989
RALPH L.DeLOACH, CLERK
BY: /s/ L. Serven DEPUTY

DENVER EARL ANDERSON, Plaintiff,	)	
v.	)	CIVIL ACTION
UNITED TELEPHONE COMPANY OF KANSAS, Defendant.	)	No. 86-2511-O

VERDICT

We, the jury, duly impaneled and sworn upon our oaths, present the following answers to the questions submitted by the court:

(1) Do you find that the defendant violated the Age Discrimination in Employment Act, in that plaintiff's age was a determining factor in defendant's decision to terminate him?

YES____ NO X

NOTE: If you answered "YES" as to question (1), then proceed to answer questions (2) and (3).

If you answered "NO" as to question (1), proceed to question (4) and do not answer questions (2) and (3).

(2) If you answered "YES" to question (1), what amount of past salary and other employment benefits has plaintiff lost as a result of defendant's discriminatory action?

$_____

(3) If you answered "YES" to question (1), was defendant's conduct "willful" in terminating plaintiff in violation of the Age Discrimination in Employment Act?

YES_____ NO_____

(4) Do you find that defendant retaliated against plaintiff by preventing his employment with United Telephone Company of Missouri, because plaintiff opposed any practice made unlawful by the Age Discrimination in Employment Act?

YES_____ NO__X__

NOTE: If you answered "YES" as to question (4), then proceed to answer question (5).

If you answered "NO" as to question (4), proceed to question (7) and do not answer questions (5) or (6).

(5) If you answered "YES" to question (4), what amount of damages do you award plaintiff on that part of his claim of retaliation?

$_____

(6) If you answered "YES" to question (5) was defendant's conduct "willful" in retaliating against plaintiff in violation of the Age Discrimination in Employment Act?

YES_____ NO_____

(7) Do you find that defendant retaliated against plaintiff by preventing his employment with Installation Technicians, Inc., because plaintiff opposed any practice made unlawful by the Age Discrimination in Employment; Act or filed a charge with the Equal Employment Opportunity Commission to enforce his rights under that Act?

YES_____ NO_X_

NOTE: If you answered "YES" as to question (7), then proceed to answer question (8).

If you answered "NO" as to question (7), proceed to question (10) and do not answer questions (8) or (9).

(8) If you answered "YES" to question (7), what amount of damages do you award plaintiff on that part of his claim of retaliation?

$_____

(9) If you answered "YES" to question (8), was defendant's conduct "willful" in retaliating against plaintiff in violation of the Age Discrimination in Employment Act?

YES_____ NO_____

(10) Do you find that defendant breached a contract of employment with plaintiff?

YES_____ NO__X__

NOTE: If you answered "YES" as to question (10), then proceed to answer question (11).

If you answered "NO" as to question (10), proceed to question (12) and do not answer question (11).

(11) If you answered "YES" to question (10), what amount of damages do you award plaintiff on his claim of breach of contract?

$_____

(12) Do you find that defendant "blacklisted" plaintiff by preventing plaintiff from obtaining employment with United Telephone Company of Missouri?

YES X NO_____

NOTE: If you answered "YES" to question (12), then proceed to answer question (13).

If you answered "NO" as to question (12), proceed to question (14) and do not answer question (13).

(13) If you answered "YES" to question (12), what amount of damages do you award plaintiff on that part of his claim of "blacklisting?"

$ $128,000.00

(14) Do you find that defendant "blacklisted" plaintiff by preventing plaintiff from obtaining employment with Installation Technicians, Inc.?

YES X NO_____

NOTE: If you answered "YES" as to question (14), then proceed to answer question (15).

If you answered "NO" as to question (14), your deliberations are complete and you need not answer any further questions.

(15) If you answered "YES" to question (14), what amount of damages do you award plaintiff on that part of his claim of "blacklisting?"

$ $128,000.00

3-1-88

/s/ Michael W. [signature illegible]
FOREPERSON

AO 450 (Rev.5/85) Judgment in a Civil Case

United States District Court

DISTRICT OF KANSAS

DENVER EARL ANDERSON

JUDGMENT IN A CIVIL CASE

V

UNITED TELEPHONE COMPANY OF KANSAS CASE NUMBER: 86-2511-0

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff take nothing and the action is dismissed on the merits. Defendant United Telephone Company of Kansas to recover of plaintiff Denver Earl Anderson, its costs of action.

FILED
MAY 22 1989
RALPH L. DeLOACH
BY: /s/ Linda Serven Deputy

May 22, 1989
Date

RALPH L. DeLOACH
Clerk

/s/ Linda Serven
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS
MAY 31 3:43 PM '89
RALPH L. DELOACH
CLERK
BY_____DEPUTY
AT KANSAS CITY, KS

DENVER EARL ANDERSON,	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	
V.	)	NO. 86-2511-0
	)	
UNITED TELEPHONE COMPANY OF KANSAS,	)	
	)	
Defendant,	)	

MEMORANDUM AND ORDER

On May 22, 1989, the court granted defendant's motion for judgment notwithstanding the verdict, but neglected to rule on its motion for new trial, prayed for in the alternative. The court finds that there was sufficient evidence to support the jury's verdict on the blacklisting claim. Accordingly, we conclude that defendant's motion for new trial should be denied if the grant of defendant's

motion for judgment notwithstanding the verdict is hereafter vacated or reversed.

IT IS SO ORDERED.

Dated this 31st day of May, 1989, at Kansas City, Kansas.

/s/Earl E. O'Connor
EARL E. O'CONNOR, Chief Judge

AO 450 (Rev.5/85) Judgment in a Civil Case

United States District Court

DISTRICT OF KANSAS

DENVER EARL ANDERSON

JUDGMENT IN A CIVIL CASE

V

UNITED TELEPHONE COMPANY OF KANSAS

CASE NUMBER: 86-2511-0

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xx **Decision by Court.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motion for new trial should be denied if the grant of defendant's motion for judgment notwithstanding the verdict is hereafter vacated or reversed.

FILED
MAY 31, 1989
RALPH L. DeLOACH, Clerk
BY: /s/ Linda Serven Deputy

May 31, 1989
Date

RALPH L. DeLOACH
Clerk

/s/Linda Serven
(By) Deputy Clerk

(2)

No. 91-408

Supreme Court, U.S.
FILED
OCT 2 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

DENVER EARL ANDERSON,

Petitioner,

v.

UNITED TELEPHONE COMPANY OF KANSAS,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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20

QUESTIONS PRESENTED

1. Did the Court of Appeals for the Tenth Circuit properly affirm the order of the district court entering judgment notwithstanding the verdict for respondent in a civil action in which petitioner had failed to plead or prove the prior criminal conviction of respondent which had been interpreted to be a necessary element of petitioner's cause of action under the Kansas blacklisting statute where respondent had raised the defense of failure to state a claim in its answer and had moved for a directed verdict at the close of petitioner's case and at the close of all the evidence on the basis that the evidence was insufficient?

2. Was the district court required to certify issues of Kansas statutory construction to the Kansas Supreme Court when none of the parties requested certification pursuant to Kan.Stat.Ann. §60-3201 and has the petitioner waived this issue by not presenting it to either the district court or the court of appeals?

3. Does the equal protection clause of the fifth amendment to the United States Constitution require that the Kansas blacklisting statute be construed to provide for civil liability in the absence of a criminal conviction when the statute provides that civil liability may only be imposed upon those "found guilty of the violation of this act", and has petitioner waived this issue by not presenting it to either the district court or the court of appeals?

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No. 91-408

In The

Supreme Court of the United States

October Term, 1991

DENVER EARL ANDERSON,

Petitioner,

v.

UNITED TELEPHONE COMPANY OF KANSAS,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent United Telephone Company of Kansas,[1] respectfully suggests that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the Court of Appeals for the Tenth Circuit. That opinion is reported at 933 F.2d 1500.

[1] The parent company of respondent is United Telecommunications, Inc.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, THE COURSE OF THE PROCEEDINGS AND DISPOSITION OF THE DISTRICT COURT.

Respondent wishes to correct the misstatements and omissions in petitioner's statement of the case as follows:

Respondent moved for a directed verdict on all five counts of petitioner's complaint at the close of petitioner's case. After oral argument, the court granted the motion on the fraud claim, and advised petitioner that the blacklisting claim would be submitted on a special verdict form so that the court could correct the verdict if necessary. The court subsequently submitted the case (exclusive of the fraud count) to the jury pursuant to Federal Rule of Civil Procedure 49(a) on a special verdict form. Although the jurors' responses to special questions 11 through 15 were favorable to petitioner, the court never entered judgment for petitioner on the responses although petitioner moved for the same on March 17, 1989.

After both parties filed their respective post-trial motions, the district court entered its Order on April 17, 1989 setting the motions for oral argument and directing the parties' attention to two unpublished opinions relating to the necessity of a criminal conviction as a prerequisite for civil liability under K.S.A. §44-119. The Order also granted the parties leave to file supplemental briefs. Both parties filed these on May 8, 1989. At that time, respondent specifically raised the requirement of a criminal conviction. Subsequently, the court entered its Order of May 22, 1989 granting respondent's Motion for Judgment

Notwithstanding the Verdict on the grounds that a criminal conviction was a prerequisite to civil liability under K.S.A. §44-117 which petitioner had not proved and that respondent had preserved the issue by raising the defense of failure to state a claim in its Answer.

Respondent disagrees with petitioner's statement of the facts to the extent it states that the sole issues herein are legal issues. In addition, petitioner's assertion that the jury returned a verdict for petitioner on the "blacklisting" count in the amount of $256,000.00 is erroneous. Rather, the jury responded favorably for petitioner in response to special questions 11 through 15 presented to it on the special verdict form.

Respondent states that there are factual issues in this case, i.e., whether in the event this Court disagrees with the Tenth Circuit's reasons for affirming the entry of judgment notwithstanding the verdict, the evidence was nevertheless insufficient to support the jury's responses as well as whether respondent is entitled to a new trial. Accordingly, the following constitutes the factual underpinnings of petitioner's claims that he was "blacklisted" in violation of K.S.A. §§44-117-119.

A. The Basis of Petitioner's Claim that Respondent "Blacklisted" Him From Obtaining Employment with United Telephone Company of Missouri

Petitioner's employment with respondent was terminated by respondent on November 26, 1985 to be effective December 31, 1985. (Tr. Vol. II at 224 and 234.) On December 14, 1985, petitioner interviewed with United Telephone Company of Missouri. United Telephone Company

of Missouri and respondent United Telephone Company of Kansas are two of the operating companies known as the "Midwest Group" which are wholly owned subsidiaries of United Telecommunications Inc. ("UTI"). (Doc. 1, p. 2.) All Midwest Group companies share a centralized personnel department. (Tr. Vol. V at 854-856.) At the time of petitioner's termination, Don Bowen was the Personnel Director of both the Kansas and Missouri companies. (Tr. Vol. V at page 857.) He learned of petitioner's interview and notified the Missouri company of petitioner's termination from the Kansas company. (Tr. Vol. IV at 660-663.) Petitioner was not offered employment by the Missouri company and asserts this denial of employment as a basis for "blacklisting" liability under K.S.A. §44-119.

B. The Basis of Petitioner's Claim that Respondent "Blacklisted" Him From Obtaining Employment with Installation Technicians, Inc.

In addition, at the time of petitioner's termination, respondent contracted telephone installation work with various independent companies, including a company known as Installation Technicians, Incorporated (hereinafter referred to as "ITI"). (Tr. Vol. III at 434.) Respondent's employee, Eugene Trinkler, advised ITI's president, Jerry Schuetz, that he did not want terminated United employees working on United jobs. (Tr. Vol. III at 440-442, 456.) However, Mr. Schuetz was thereafter advised by Don Bowen that he could use whomever he wanted. (Tr. Vol. IV at 726.) ITI's president testified that petitioner was not denied employment because of any urging by respondent and stated that all positions for

which petitioner was qualified were filled. (Tr. Vol. III at 455 and Volume IV at 731.)

REASONS FOR DENYING THE WRIT

I. THE OPINION OF THE TENTH CIRCUIT COURT OF APPEALS AFFIRMING JUDGMENT NOTWITHSTANDING THE VERDICT DOES NOT CONFLICT WITH OTHER COURTS OF APPEAL.

The Tenth Circuit Court of Appeals correctly held that respondent's Motion for a Directed Verdict on the basis of insufficiency of the evidence preserved respondent's challenge to petitioner's failure to prove a criminal conviction of the Kansas blacklisting statute in its Motion for Judgment Notwithstanding the Verdict. Petitioner's assertion that the Tenth Circuit Court's decision conflicts with decisions of that and other circuits is without merit.

None of the cases upon which petitioner relies conflict with the opinion of the Tenth Circuit Court of Appeals that a motion for directed verdict challenging the sufficiency of the evidence on a specific count preserves the issue for a subsequent motion for judgment notwithstanding the verdict. Nor do any of the cases cited by petitioner involve a challenge to the sufficiency of the evidence which insufficiency is impossible to remedy as the petitioner admits is the case in the instant matter. *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275 (8th Cir. 1981) involved a general motion for directed verdict not directed to any counts or issues; *Brown v. Trustees of Boston University*, 891 F.2d 337 (1st Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3217 (1990) involved a post-trial

argument directly contrary to the argument raised in the directed verdict motion; *Brooks v. Monroe Sys. For Business, Inc.*, 873 F.2d 202 (8th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 154 (1989), involved the failure to prove a condition precedent which failure was not raised in the motion for directed verdict; *Dow Chemical Corp. v. Weevil-Cide Co.*, 897 F.2d 481 (10th Cir. 1990) involved a motion for directed verdict which did not raise the issue of the petitioner's fault in a subrogation claim; and *Karns v. Emerson Elec. Co.*, 817 F.2d 1452 (10th Cir. 1987) involved the failure to renew a motion for directed verdict at the close of all the evidence.

Indeed, the analysis of the Tenth Circuit Court of Appeals as to whether the purposes of Rule 50 of the Federal Rules of Civil Procedure were served in this case is consistent with the liberal construction of the rule applied by other circuit courts. *See Acosta v. Honda Motor Co.*, 717 F.2d 828 (3rd Cir. 1983); and *FSLIC v. Reeves*, 816 F.2d 130 (4th Cir. 1987).

As the court of appeals correctly found, the purposes of Rule 50 were served because petitioner could not overcome the evidentiary failure as he conceded respondent was never criminally convicted of a violation of the statute. Moreover, the record clearly indicates that the district court apprised petitioner of problems with his theory at the close of petitioner's case, announcing that he would submit the case to the jury on a special verdict form so that the novel issues raised by the statute could be addressed post-trial in the event of a verdict favoring petitioner:

> THE COURT: There's no law on this statute, Kansas has never used it. You're the first people

> that have even tried to use it that I can remember. And there's just no law, and, you know, if you get a verdict on this, I'd say your chances are probably pretty good it would be reversed. [Tr., Vol. IV at 716.] . . .
>
> THE COURT: Frankly, my thought is probably I am going to let this go to the jury on blacklisting, but I am going to separate all these claims out on a verdict form so if I later determine that there's something wrong, I can knock out at least part of this case. [Tr., Vol. IV at 719-720.]

Finally, because this case was submitted to the jury pursuant to Federal Rule of Civil Procedure 49(a), the district court properly found that no criminal conviction was proved and entered judgment upon the special verdict. *See Traders and General Ins. Co. v. Mallitz*, 315 F.2d 171 (5th Cir. 1963) (even failure to move for a directed verdict does not prevent the rendering of a proper judgment upon a special verdict). *Accord, Ingersoll v. Mason*, 254 F.2d 899 (8th Cir. 1958); 9 Wright and Miller, *Federal Practice and Procedure:* Civil §2510 (1969).

II. THE TENTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT PROOF OF A CRIMINAL CONVICTION IS AN ELEMENT OF PETITIONER'S CAUSE OF ACTION AND NOT A CONDITION PRECEDENT.

The Tenth Circuit Court of Appeals correctly ruled that proof of a criminal conviction was not a "condition precedent", but rather an element of petitioner's cause of action for blacklisting which he simply failed to plead or prove. Petitioner cites no authority to the contrary: the

cases cited by petitioner did not involve a criminal conviction or the Kansas blacklisting statute. *Ginsburg v. Ins. Co. of N. Am.*, 427 F.2d 1318 (6th Cir. 1970) and *Lumbermens Mut. Ins. Co. v. Bowman*, 313 F.2d 381 (10th Cir. 1963) involved notice to and filing of proof of loss on insurance policies; *Brooks v. Monroe Sys. for Business, Inc.*, 873 F.2d 202 (8th Cir. 1989), and *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992 (11th Cir. 1982) involved administrative prerequisites to a Title VII action; and *McKee-Berger-Mansueto, Inc. v. Board of Educ.*, 626 F.2d 559 (7th Cir. 1980) involved contractual nonperformance. There is simply no basis for petitioner's assertion that a criminal conviction should be considered a condition precedent as opposed to an element of petitioner's claim.

Indeed, even if the court of appeals improperly decided that a criminal conviction was an element of petitioner's cause of action (as opposed to a condition precedent) respondent was not required to specifically deny the same because petitioner had failed to generally aver that all conditions precedent have occurred as required by Federal Rule of Civil Procedure 9(c). As the district court correctly noted:

> Nowhere in his pleadings does petitioner state that all conditions precedent have occurred. Therefore, Rule 9(c) is inapplicable and defendant was not required to make more than a general denial of the legal sufficiency of plaintiff's claim. (App. at 66).

Finally, petitioner's brief erroneously asserts that respondent did not timely raise the defense of failure to state a claim. As the court of appeals correctly found, "[t]he respondent here raised the defense of failure to

state a claim for blacklisting at the first opportunity in the answer to the complaint." 933 F.2d at 1504.

Thus, the Tenth Circuit Court's opinion does not conflict with *Brooks v. Monroe Sys. for Business, Inc.*, 873 F.2d 202 (8th Cir. 1989) (which involved a Title VII agency exhaustion claim) or *Weatherhead v. Globe Int'l, Inc.*, 832 F.2d 1226 (10th Cir. 1987) (motion to dismiss for failure to state a claim held timely filed).

III. THIS COURT SHOULD NOT CONSIDER PETITIONER'S CONSTITUTIONAL ARGUMENTS WHICH WERE NOT PRESENTED TO THE DISTRICT COURT OR COURT OF APPEALS AND WHICH DO NOT MERIT REVIEW BY THIS COURT

For the first time, petitioner in his petition for certiorari has raised the issue of the constitutionality of construction of the Kansas blacklisting statute. This Court's jurisdiction to review decisions of the lower courts by certiorari is a limited one. It is usually not exercised when an issue has not been previously briefed and addressed, and it is untimely for petitioner to raise a constitutional argument at this juncture. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below . . . [T]his is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Id.* at 120 (1976). (Citations and quotations omitted).

Not only is petitioner's constitutional argument untimely, it is without merit as there is no basis for finding the Kansas blacklisting statute unconstitutional. The district court in this case held that the plain language of the Kansas blacklisting statute, K.S.A. §§44-117-119, requires an employer to be found guilty in a criminal proceeding before it may be subjected to civil liability. The Court of Appeals for the Tenth Circuit similarly held that in examining the statutory language and applying its ordinary meaning, "we are convinced the Kansas Legislature meant a corporation shall 'be liable' only when it has been 'found guilty' of criminal blacklisting."

Petitioner contends that the above interpretation is unconstitutional, relying upon *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) in which this Court held that a criminal conviction was not a prerequisite to a civil action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-1968. However, the *Sedima* opinion dealt specifically with the construction of the RICO Act and addressed the lower court's concern that *elimination* of the criminal conviction prerequisite would raise "severe constitutional questions". *Id.* at 492. In rejecting this argument, the Court gave no indication that the statute itself could be found unconstitutional. Rather, based upon a record replete with a particular legislative purpose, the Court determined that a criminal conviction was not a prerequisite to civil liability. *Id.* at 493.

The Kansas blacklisting statute is distinguishable from the RICO Act in that the language of the Kansas statute clearly requires a criminal adjudication of guilt before imposing civil liability. Only if the statute is

ambiguous and unclear may the Court disregard the statute's plain and literal meaning. *Boaldin v. Univ. of Kansas*, 242 Kan. 288, 747 P.2d 811, 814 (1987). In construing the scope of a statute, its language, if unambiguous, must be regarded as conclusive "in the absence of a clearly expressed legislative intent to the contrary". *United States v. Turkette*, 452 U.S. 576 (1981). Thus, petitioner's citation of 16 C.J.S. §96 stating that a statute must always be given an interpretation that is constitutional is irrelevant as no real question regarding the constitutionality of the Kansas blacklisting statute has been raised.

Petitioner also contends the Kansas blacklisting statute violates the equal protection clause of the fourteenth amendment, apparently based upon the assumption that not all prosecutors will perform their duties to their fullest abilities. As a consequence, petitioner contends, some employees will be able to bring a private action after a criminal conviction has been rendered while others, where prosecutors were less diligent, will be unable to redress their wrongs. Of course, the assumption of nonfeasance renders all statutes and laws unconstitutional which, if not properly enforced, would render unequal results. Clearly, such an assumption begs the question of whether the Kansas legislature can decide to create a remedy only for victims of criminal activity, as opposed to non-criminal activity. Petitioner cites no authority for the proposition that such a statute violates the equal protection clause.

Petitioner also contends for the first time on appeal that the petitioner was deprived of his fifth amendment due process rights because the statutory interpretation issue was not certified to the Supreme Court of Kansas.

Apparently, petitioner contends that the Kansas certification statute is a "procedural safeguard" to prevent the federal district court from improperly applying the law of the forum state as required in this diversity case by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Petitioner not only fails to cite any authority for the proposition that the due process clause requires a federal district court sitting in a diversity case to abdicate its authority to a state supreme court, but also fails to mention that the applicable certification statute, K.S.A. 60-3201, is a discretionary one, providing that a court "may" accept certification. Indeed, although petitioner contends that the district court *failed* to certify or allow for certification to the Supreme Court of Kansas, the record will reflect that petitioner has never made a request for certification as permitted by the statute.

IV. THE JUDGMENT NOTWITHSTANDING THE VERDICT WAS CORRECT BECAUSE THE EVIDENCE WAS OTHERWISE INSUFFICIENT TO ESTABLISH A VIOLATION OF THE KANSAS BLACKLISTING STATUTE.

Respondent respectfully suggests that the evidence was otherwise insufficient to support the jury's responses to the special questions. There was no evidence that petitioner had an expectation of employment with United Telephone Company of Missouri. The person in charge of hiring at the Missouri company knew petitioner and testified that petitioner "talked more than he worked" and that he probably would not have hired petitioner had he completed the interview with him. On the other hand, the

president of ITI stated he had no positions available for petitioner.

Secondly, United Telephone Company of Missouri and United Telephone Company of Kansas are "sister" companies that share a centralized personnel department. There was no evidence that respondent prevented petitioner's employment with "another corporation" when its affiliate determined not to hire petitioner. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) and *Directory Sales Management Corp. v. Ohio Bell Telephone Co.*, 833 F.2d 606 (6th Cir. 1987).

Finally, there was no evidence that respondent's actions were not justified. Mr. Bowen was clearly justified in sharing information with his "employer" United Telephone Company of Missouri. Similarly, Mr. Trinkler had a legitimate concern when he requested that ITI not use terminated employees on United property.

CONCLUSION

The Petition presents no important question of federal law nor any conflict among the circuit courts of appeal. This case turns upon facts unique to this case and these parties and the Tenth Circuit Court of Appeals properly affirmed the decision of the district court. There is no need for additional review by this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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